

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MARIA CRUZ GARZA)	
Claimant)	
V.)	
)	Docket No. 1,068,825
AEROSPACE LOGISTICS SERVICES)	
Respondent)	
AND)	
)	
SENTRY CASUALTY COMPANY)	
Insurance Carrier)	
AND)	
)	
MARIA CRUZ GARZA)	
Claimant)	
V.)	
)	Docket No. 1,070,162
EXPRESS PERSONNEL SERVICES)	
Respondent)	
AND)	
)	
CONTINENTAL WESTERN INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent, Express Personnel Services, requests review of the May 11, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Gary K. Jones.

APPEARANCES

Paul V. Dugan, of Wichita, Kansas, appeared for the claimant. Kendra M. Oakes and Clifford K. Stubbs, of Kansas City, Kansas, appeared for Express Personnel Services and its insurance carrier. David P. Mosh and John B. Rathmel, of Kansas City, Missouri, appeared for Aerospace Logistics Services and its insurance carrier.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from March 10, 2015, with exhibits attached; transcript of Preliminary Hearing from April 28, 2016, with exhibits attached; Evidentiary Deposition of Terrence Pratt, M.D., from February 18, 2016, and the documents of record filed with the Division.

ISSUES

The ALJ concluded both claimant's December 20, 2013, and June 16, 2014, accidents contributed to claimant's condition, but the prevailing factor for claimant's present medical condition and current need for treatment is the June 16, 2014, accident.

Express Personnel Services and Continental Western Insurance Co. (Express) appeal, arguing claimant's current problems are a direct and natural consequence of the December 20, 2013, injury and that the prior injury is the prevailing factor in causing her injury and medical condition.

Aerospace Logistics Services and its carrier (Aerospace) argue the ALJ's Order should be affirmed.

The issue on appeal is the compensability of the claim against Express, specifically:

1. Is claimant's current condition a direct and natural result of her December 20, 2013, accident; or
2. Is claimant's alleged June 16, 2014, accident the prevailing factor in causing claimant's injury, medical condition and any resulting impairment or disability?

FINDINGS OF FACT

On December 20, 2013, during her employment with Aerospace, claimant suffered injury to her left shoulder, neck and both knees after tripping over computer cables. Claimant testified she tried to grab onto something to keep from falling, but her arm got turned backwards and she fell.

Claimant met with John P. Estivo, M.D., on January 16, 2014, for evaluation and treatment of her left shoulder, both knees and great toe on the right foot. Claimant complained of left shoulder pain, right and left knee pain and right foot pain involving the first and second toes. Dr. Estivo determined the prevailing factor for claimant's knee pain

and left shoulder pain to be the December 20, 2013, incident. He recommended an MRI of the left shoulder and both knees.

On January 27, 2014, claimant continued to have pain in her knees and left shoulder. A January 18, 2014, MRI revealed a full thickness rotator cuff tear involving the supraspinatus, along with tendinitis. There were no acute abnormalities in the MRI of claimant's knees. Claimant reported lumbar spine pain, which she indicated began around January 16, 2014. Claimant reported her lower back pain began after she fell on December 20, 2013, and was increased with walking and compensating for the right and left knee discomfort. Dr. Estivo would not relate claimant's lumbar spine complaints to the December 20, 2013, incident. Dr. Estivo found the prevailing factor for the left shoulder rotator cuff tear was the December 20, 2013, incident. He recommended surgery for the left shoulder. Dr. Estivo performed surgery on claimant's left shoulder on February 4, 2014, to repair a rotator cuff tear.

On February 10, 2014, claimant was seen for followup, post left shoulder surgery. She was doing well and allowed to work with temporary restrictions, including no use of the left arm. Her pain was controlled with pain medication. She still complained of right and left knee discomfort.

On February 17, 2014, claimant was seen for followup with right and left knee discomfort and some left shoulder discomfort. She continued working with temporary restrictions, including no use of the left arm. Her pain was controlled with pain medication.

On March 5, 2014, claimant showed improvement and Dr. Estivo recommended claimant continue with physical therapy and was allowed to work with temporary restrictions.

On March 19, 2014, Dr. Estivo administered an injection in the right knee, and recommended claimant continue with physical therapy and continue working with temporary restrictions.

On April 3, 2014, claimant reported some discomfort in her left elbow. Claimant continued to make progress with her knees and left shoulder. Dr. Estivo recommended claimant continue with physical therapy for her left shoulder and both knees. He had no explanation for claimant's left elbow discomfort and noted she had no problems with it while she was wearing the immobilizer for her shoulder. Claimant was allowed to continue working with restrictions.

On April 16, 2014, claimant continued to have right and left knee pain, but much less than previously. Claimant believed physical therapy was helping. Her shoulder continued to improve post-surgery. Dr. Estivo recommended continued physical therapy and medication. Claimant continued to work with temporary restrictions.

On April 30, 2014, claimant continued to have right and left knee discomfort and occasions of left shoulder discomfort post rotator cuff repair. Claimant exhibited a full range of motion in her cervical spine, with no tenderness or muscle spasm. Dr. Estivo recommended continued physical therapy and work with temporary restrictions.

On May 14, 2014, Dr. Estivo opined that claimant was close to maximum medical improvement (MMI) and recommended she finish physical therapy. Claimant remained on temporary restrictions of a maximum lift with the left arm of 15 pounds and no over the shoulder work on the left side.

On May 28, 2014, claimant presented with mild intermittent discomfort in both knees. Her left shoulder displayed only occasional mild discomfort with overhead movements. She was overall satisfied with her shoulder surgery and had no other complaints. Dr. Estivo diagnosed resolved right and left knee strain and status post left shoulder rotator cuff repair. Dr. Estivo found claimant at MMI. He found no further need for medical treatment in relation to the claim and recommended a permanent restriction of occasional over shoulder height work with the left upper extremity. He assigned, based on active range of motion of the left shoulder, a 7 percent impairment to the left upper extremity and for the distal clavicle resection a 10 percent impairment to the left upper extremity. These values were combined for a 17 percent impairment to the left upper extremity. Claimant was released from care.

Claimant disputes Dr. Estivo gave her any restrictions upon her release, testifying the release form she was given, and what she gave her boss, had no restrictions and that is why she was placed in a hard job with Express. Interestingly, in Respondent's Exhibit 2, page 4 of the March 10, 2015, preliminary hearing transcript, the restriction to over-shoulder work with the left arm indicates "resolved". This form lists a May 28, 2014 discharge date. In that same exhibit, page 3, a restriction form, also dated May 28, 2014, indicates restrictions of only occasional over-shoulder work with the left upper extremity as "permanent". At the top of that form is hand-written "error on original", with another note stating the form had been faxed to Russ Kort-adjuster.

Claimant was returned to work in June 2014, at which time claimant's employer had changed to Express. Claimant indicated Express sent her to work performing a job that was very heavy. On her first day back at work, June 16, 2014, claimant re-injured her left shoulder. While trying to move carpet, she felt a pop in her shoulder and, 30 minutes later, her shoulder was hurting.

Claimant testified her shoulder pain went up into her neck. She denied any trouble with her neck prior to the June 2014 incident. Claimant also denied any pain in her left shoulder immediately before returning to work in June 2014. She indicated she had no lingering effects from the surgery with Dr. Estivo prior to the June 2014 incident.

The parties agree claimant injured her left shoulder and that the pain extends into her neck, leaving her in need of treatment. The issue is against what date of injury the need for treatment falls and the prevailing factor for this need for treatment.

Claimant denied she was having continued problems from her first accident, at the time of her second accident. She also denied continuing to take medication for the first accident, at the time of the second accident. Claimant acknowledged she told Dr. Fluter and Dr. Pratt that she went home and took two pain pills after the second accident. Claimant was having problems after the second accident that she did not have after the first, including pain from her shoulder to her neck.

Claimant met with George G. Fluter, M.D., on July 31, 2014, as a referral by her attorney, for an examination and treatment recommendations. Claimant complained of pain affecting the left side of her neck/upper back, left shoulder, left elbow/upper arm, lower back, both hips, both knees and both feet. Claimant alleges she had no work restrictions at the time of this visit.

Dr. Fluter examined claimant and opined, based on the information available and to a reasonable degree of medical probability, there is a causal/contributory relationship between claimant's current condition and the reported work-related injury on December 20, 2013, and its sequelae, and the work-related injury on June 16, 2014. He found the prevailing factor for the injuries and the need for medical treatment/evaluation is the reported work-related injuries occurring on both December 20, 2013, and June 16, 2014.

Dr. Fluter assigned claimant temporary restrictions and recommended medication, additional imaging studies and pool-based physical therapy, soft braces for her knees during periods of activity, a soft cervical collar during periods of activity, interventional pain management and, depending on the results of the testing, a neurosurgical and/or orthopedic spine surgical consultation regarding the neck.

Claimant met with Pat Do, M.D., for an examination on September 18, 2014. Claimant provided a history of pain in her left shoulder, which was caused by a work injury on June 16, 2014. Claimant reported that her neck began hurting two and a half months ago. Her pain is aggravated by lifting, twisting and lying in bed.

Dr. Do diagnosed myofascial neck pain; left shoulder pain; rotator cuff syndrome; impingement; probable rotator cuff pathology; and status post left shoulder arthroscopy. Dr. Do explained claimant's treatment options and recommended an MRI of the left shoulder to get a good look at the rotator cuff and, should a tear be present, physical therapy and a possible cortisone injection. Claimant was allowed to continue without restrictions.

Claimant had an MRI on October 3, 2014, which revealed tendinosis, osteoarthritis, outlet stenosis and a mild inferolateral acromial tilt.

On October 21, 2014, claimant was seen for followup of her ongoing symptoms and was started on Mobic and sent for four weeks of physical therapy. If therapy was not successful, a cortisone injection would be provided and if that was not successful, surgical intervention would be considered. Claimant was returned to work without restrictions.

In his December 3, 2014, report, Dr. Do described claimant's not very impressive mechanism of injury in June 2014, which was only four months after rotator cuff repair. He concluded claimant's need for treatment of the left shoulder was not due to the June 16, 2014, accident.

On February 5, 2015, Dr. Do opined claimant's left shoulder rotator cuff tear was the result of her injury from December 20, 2013. Dr. Do determined claimant's myofascial neck pain was from protecting her injured left shoulder. He recommended physical therapy, medication, injections and a possible left rotator cuff repair, and restrictions of limited overhead work with the left shoulder and no lifting more than 20 pounds with the left.

Claimant returned to Dr. Estivo on April 7, 2015, with left shoulder pain and left-sided neck pain. After examining claimant, Dr. Estivo opined claimant had a left shoulder partial thickness rotator cuff tear related to the June 16, 2014, accident and a history of previous rotator cuff repair in relation to a December 20, 2013, injury. He indicated claimant had recovered from the December injury when he saw her in May 2014. He noted claimant has had increased pain and weakness in her left shoulder since June 16, 2014. After reviewing the October 3, 2014, MRI of the left shoulder, Dr. Estivo opined claimant now has a structural change to her left shoulder in relation to the June 16, 2014, accident. In his opinion, the prevailing factor regarding the high grade partial thickness rotator cuff tear is the June 16, 2014, accident. Dr. Estivo opined claimant's left-sided neck issues are most likely related to compensation for the left shoulder injury.

Claimant met with Terrence Pratt, M.D., on December 4, 2015, for a court-ordered independent medical examination (IME). Claimant had intermittent cervical symptoms with a stretching upper parascapular area to the left cervical region and intermittent left shoulder symptoms. Dr. Pratt noted claimant continued to use medication for her shoulder discomfort.

Dr. Pratt opined claimant has cervicothoracic syndrome without significant evidence of radiculopathy; left shoulder syndrome with history of a supraspinatus full-thickness tear with impingement; status post subacromial decompression, distal clavicle resection and mini open rotator cuff repair; partial thickness tear, supraspinatus tendon with tendinosis and/or partial tearing of the biceps tendon, mild acromioclavicular osteoarthritis and

findings consistent with impingement. Dr. Pratt opined it is more probable than not that the second accident resulted in aggravation of underlying involvement of the left shoulder, and that the December 2013 accident is the prevailing factor in claimant's shoulder involvement. He found the cervicothoracic involvement did not occur at the time of the initial accident and is secondary to the shoulder.

Dr. Pratt testified:

A. My report was based on a history of residual symptoms, to the degree that medications were being utilized for residual discomfort in the shoulder and had been occurring under those circumstances.

If we consider that she was asymptomatic before the event, then I could not state to a reasonable degree of medical certainty that her first event was the prevailing factor in all of her shoulder involvement.

Q. If it was not the first accident, then what would your opinion be as to what the prevailing factor for her current need for treatment is?

A. The subsequent event.¹

. . .

Q. (By Mr. Lawson) What is your opinion as to what the prevailing factor Ms. Garza's current need for medical treatment is?

A. If her sworn testimony is accurate, then it was the second event. Based on what she reported at the time that I assessed her it would be the first event, but both cannot be true. Both statements, that she was still having discomfort utilizing medications or she was fine, both cannot be true statements.

Q. But then if it's correct -- I want to make sure I understand you. If her sworn testimony is correct, you would feel the second accident was the prevailing factor.

A. Correct.

Q. If her statements to you at the evaluation are correct, it's the first accident.

A. That's correct.²

Dr. Pratt indicated that, in the medical records he reviewed, when claimant last saw Dr. Estivo, she complained of discomfort in her shoulder. He indicated had claimant not

¹ Pratt Depo. at 6-7.

² *Id.* at 11-12.

had shoulder surgery, she probably would not have injured herself lifting carpet. Claimant's shoulder probably was not fully healed at the time of the second accident. Claimant's neck and bicep problems were noted after second accident and not the first.

At the April 28, 2016, preliminary hearing, claimant denied continuing problems from her first accident to her second accident. Claimant was having pain from her shoulder to her neck after the second accident, pain she did not have after the first.

Claimant indicated that four doctors she met with focused on her first accident. She was able to work for several weeks after the second accident that occurred four hours into her first day back to work. Claimant was able to work because she used her right arm and not her left.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2013 Supp. 44-508(f)(1)(2)(B) states:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

...

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2013 Supp. 44-508(g) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

It is undisputed claimant suffered two separate accidents, both to her left shoulder, with additional involvement in her knees from the first and her neck from the second. Making sense of claimant's complaints after each accident, from both claimant's testimony and from the various health care providers is complicated. The matter is further complicated by claimant's injuries occurring in the left shoulder after both accidents, with injury to the rotator cuff occurring from each incident, and with the injuries occurring only six months apart and the second occurring only four months after the surgery from the first accident.

The medical opinions, from qualified orthopedic surgeons are diametrical. Dr. Do and Dr. Estivo's opinions conflict, and are both well supported, depending on which history of claimant's complaints are determined most reliable.

Dr. Fluter found the two dates of injury to be equally guilty on the issue of causation, while Dr. Pratt identified the offending accident to hinge on whether claimant was asymptomatic before the second accident occurred, or not.

Finally, as noted by the ALJ, claimant testified that she had no symptoms immediately before the June 16, 2014, accident. To further complicate the record, claimant testified she was released without restriction and that testimony is supported by the March 10, 2015, preliminary hearing transcript, with Exhibit 2, displaying conflicting work status forms which either return claimant to work with her over-the-shoulder restrictions resolved or not.

To a significant extent, this result hinges on claimant's testimony regarding her physical condition leading up to the second accident on June 16, 2014. Was she

symptomatic or not? Did she have restrictions or not? The ALJ had the opportunity to observe claimant testify on two separate occasions and determined claimant's testimony that she was doing well, with no shoulder symptoms before the June 16, 2014, accident was the most credible.

The Board will, at times, give deference to an ALJ's determination as to the credibility of testimony. In this instance, the ALJ found, based upon the medical reports and claimant's testimony, the prevailing factor causing claimant's current injury and need for medical treatment is the June 16, 2014, accident. This Board Member finds that conclusion supported by this record and affirms same.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. This record supports a finding that the accident on June 16, 2014, is the prevailing factor leading to claimant's injury and current need for medical treatment.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Gary K. Jones dated May 11, 2016, is affirmed.

³ K.S.A. 2014 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of July, 2016.

HONORABLE GARY M. KORTE
BOARD MEMBER

c: Paul V. Dugan, Attorney for Claimant
kelly@dgwichitalaw.com

Clifford K. Stubbs and Kendra M. Oakes, Attorneys for Express Personnel Services
and its Insurance Carrier

mvpkc@mvplaw.com
cstubbs@mvplaw.com
koakes@mvplaw.com
bduncan@mvplaw.com

David P. Mosh and John B. Rathmel, Attorneys for Aerospace Logistics Services
and its Insurance Carrier

dmosh@evans-dixon.com
jrathmel@evans-dixon.com

Gary K. Jones, Administrative Law Judge